(2)

No. 05-830

In The Supreme Court of the United States

LAURA ESTELA SALAZAR-REGINO
and NOHEMI RANGEL-RIVERA,

Petitioners,

v.

MARC MOORE, REGIONAL DIRECTOR,
DEPARTMENT OF HOMELAND SECURITY, BUREAU
OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

and

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF FOR PETITIONER

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I. THE INSTANT CASE SHOULD NOT BE HELD IN ABEYANCE

After the instant petition was filed, certiorari was granted in *Lopez v. Gonzales,* No. 05-547, and *Toledo-Flores v. United States,* No. 05-7664, which present virtually the same issue as herein. As formulated by the Court in *Lopez*, the question presented is:

> Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

The Respondent's brief herein, at p. 11, suggests that:

> The petition for a writ of certiorari should be held pending this Court's decision in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664, and then disposed of in accordance with the Court's decision in those consolidated cases.

Petitioners urge that holding the instant case in abeyance would not serve the interests of justice, or judicial economy.

A. THE INSTANT CASE RAISES ADDITIONAL CONSTITUTIONAL CONCERNS

First, when Petitioner Salazar negotiated her plea, deferred adjudication was not considered a "conviction" for immigration purposes. *Matter of Manrique,* 21 I&N Dec. 58 (BIA 1995). When Ms. Rangel arranged her plea, it was a conviction, but the offense was not an aggravated felony. *Matter of L-G-,* 21 I&N Dec. 89 (BIA 1995). Retroactively characterizing these dispositions not only as convictions,

but as aggravated felonies, raises "fair notice" issues under *BMW v. Gore,* 517 U.S. 559 (1996), and *INS v. St. Cyr,* 533 U.S. 289 (2001), and other constitutional concerns not present in *Lopez* or *Toledo-Flores. See,* Petition for Writ of Certiorari, at pp. 11-12, 23-24, and Appendix, at pp. 62-66, 92-102. If only for reasons of constitutional avoidance, as in *Zadvydas v. Davis,* 533 U.S. 678 (2001) (construing 8 U.S.C. §1231 to avoid constitutional problems), these considerations should be before the Court when it addresses the underlying issue.

B. THERE ARE POTENTIALLY SIGNIFICANT FACTUAL DIFFERENCES

Second, in their response to the Petition for Certiorari in *Lopez,* the Government implied that the sentence imposed was pertinent to determining whether a state offense was an aggravated felony, restating the issue presented therein as follows:

> Whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," where the alien was sentenced under state law to more than one year of imprisonment.

The Petitioners herein received deferred adjudication, with no underlying sentence. A decision in *Lopez* and *Toledo-Flores* would therefore not necessarily be dispositive of their cases.

C. RESPONDENTS APPEAR TO ADVOCATE A "CONDUCT" BASED ANALYSIS HEREIN, WHICH ALSO RENDERS THE INSTANT CASE DISTINGUISHABLE

Third, it appears that, should the issue be reached, the Government intends to advocate a fact-based test for determining whether a state felony drug offense would be a misdemeanor under federal law, rather than a categorical approach. *See, Shepard v. United States*, 125 S.Ct. 1254, 1259 (2005) (the categorical approach analyzes offenses in terms not of conduct but in terms of the elements of the offenses). In its Response, at pp. 9-11, the Government asserts, (emphasis added):

> On April 3, 2006, this Court granted certiorari in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664, to decide *whether the commission of a controlled substance offense* that is a felony under state law, *but that is generally punishable under the Controlled Substances Act only as a misdemeanor*, constitutes an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). . . .[1]
>
> We note, however, that there is substantial doubt that the *conduct* in which petitioners engaged would have been treated as misdemeanor cases of simple possession under federal law. . . .

The lengthy discussion of the circumstances of Ms. Rangel's offense, and expression of "substantial doubt" as to whether Petitioners' *conduct* would have been prosecuted as misdemeanors under federal law, suggest that if the Court reaches

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[1] This language was drawn from the Government's restatement of the issue in *Lopez*, not from the actual grant of certiorari.

the issue, Respondent intends to urge a fact ("conduct") based approach to determining whether a conviction is an aggravated felony. *See, Gonzales-Gomez v. Achim,* 2006 U.S. App. LEXIS 7066 (7th Cir., March 22, 2006) (suggesting that the amount of drugs involved could be used to determine whether a conviction was an aggravated felony).

However, following this Court's lead in *Taylor v. United States,* 495 U.S. 575 (1990), the Fifth Circuit has long used the categorical approach to determine the nature of an offense. *See, e.g., Hamdan v. INS,* 98 F.3d 183 (5th Cir. 1996), and *United States v. Martinez-Cortez,* 988 F.2d 1408 (5th Cir. 1993). Therefore, when Ms. Rangel entered her plea, as at her hearing, it was understood that, under the categorical approach, her *conviction* was not a drug "trafficking" offense, under 8 U.S.C. §1101(a)(43)(B). *See,* Petition for Writ of Certiorari, App. at pp. 165-172).

It is unclear from the pleadings in *Lopez* and *Toledo-Flores* whether use of a "conduct" based, rather than a categorical approach, would affect the ultimate result. By contrast, application of such an approach to Petitioners would clearly affect the conclusion, and would therefore also raise Due Process ("fair notice"), concerns. For example, as the Government noted, (Response, at pp. 5-6), during the hearing on Ms. Rangel's application for cancellation of removal, testimony was elicited showing that, as a matter of fact, she was "trafficking" the marijuana. Again, these considerations should be before the Court when it resolves the underlying issue.

II. CONCLUSION

Petitioners therefore urge that granting certiorari, and setting a briefing schedule parallel to that of *Lopez v.*

Gonzales and *Toledo-Flores v. United States*, would give the Court a more complete picture of the fact variations, and illuminate the constitutional concerns underlying what would otherwise be a question of pure statutory construction. As in *Zadvydas v. Davis, supra*, such considerations are sometimes pivotal. Going forward with the case at bar would thus ensure that *all* the issues raised by these cases, or likely to be presented by others in this series,[2] are before the Court when it addresses the statutory question.[3]

Therefore, Petitioners urge that the interests of justice, and judicial economy, are best served by going forward with the case at bar, in conjunction with *Lopez* and *Toledo-Flores*.

Respectfully submitted,

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[2] As previously noted, (Petition at p. 14), about thirty more such cases are pending at the Fifth Circuit, including the seven initially consolidated with those of the Petitioners herein. *See*, App. at pp. 66-89. A Petition for Certiorari in two similar cases was filed March 31, 2006. *Galindo-Pena et al. v. Gonzales*, No. 05-1276.

[3] The United States Magistrate Judge concluded herein that retroactive application of *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001) (holding that a state felony conviction for simple drug possession was an aggravated felony), deprived Petitioners of "fair notice" under *BMW v. Gore, supra*, (App. at 96-102), although the District Court disagreed, finding that they had no liberty interest, and thus no Due Process rights, in applications for discretionary relief, (*id.* at 47-50).